

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOEL RUIZ, on behalf of himself and) Case No. 07-5739 SC  
all others similarly situated, )  
Plaintiff, ) ORDER GRANTING IN  
v. ) PART AND DENYING IN  
GAP, INC., and DOES 1-9 inclusive, ) PART PLAINTIFF'S  
Defendants. ) AMENDED MOTION FOR  
LEAVE TO FILE FIRST  
AMENDED COMPLAINT

**I. INTRODUCTION**

This matter comes before the Court on Plaintiff's Amended Motion for Leave to File First Amended Complaint ("Motion"). Docket No. 81. Plaintiff Joel Ruiz ("Ruiz") attached to the Motion a copy of the proposed First Amended Complaint ("FAC"). Id. Ex. A. Defendant Gap, Inc. ("Gap") filed an Opposition and Plaintiff submitted a Reply. Docket Nos. 84, 86. For the reasons stated herein, the Motion is GRANTED IN PART and DENIED IN PART.

**II. BACKGROUND**

This action arises out of the theft from a Gap vendor of two laptop computers that contained the personal information, including social security numbers, of approximately 750,000 Gap job applicants. The information was not encrypted and was

1 therefore easily accessible. In response to these thefts, Gap  
2 notified the applicants whose personal information was on the  
3 computers and offered to provide these applicants, including Ruiz,  
4 with twelve months of credit monitoring and fraud assistance  
5 without charge. Ruiz was one of the applicants and, in reaction  
6 to the theft of the laptops, he filed the present class action.

7 On March 24, 2008, the Court granted in part and denied in  
8 part Gap's Motion for Judgment on the Pleadings ("March 24, 2008  
9 Order"), Docket No. 46. Although originally set for October 1,  
10 2008, the discovery cutoff was extended to December 23, 2008.  
11 Docket Nos. 52, 75. Neither Ruiz nor Gap has filed motions for  
12 summary judgment, and no trial date has been set.

13 Ruiz's Motion seeks leave to amend the Complaint to: (1) name  
14 Gap's vendor as a defendant; (2) add a claim for violation of the  
15 California Unfair Competition Law, Business & Professions Code,  
16 section 17200 et seq.; and (3) to add a breach of contract claim  
17 against the vendor. Mot. at 5.

### 18 19 **III. LEGAL STANDARD**

20 With leave of the court, a party may amend its pleadings, and  
21 "[t]he court should freely give leave when justice so requires."  
22 Fed. R. Civ. P. 15(a)(2). This policy should be applied with  
23 "extreme liberality." Eminence Capital, LLC v. Aspeon, Inc., 316  
24 F.3d 1048, 1051 (9th Cir. 2003). However, district courts may  
25 deny amendments that would cause undue prejudice to the defendant,  
26 that are sought in bad faith, that are futile, or that would cause  
27 undue delay. Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir.

1999). Undue delay by itself is not sufficient to justify denying a motion to amend. Id. The party opposing the amendment bears the burden of showing prejudice. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987).

#### 6 IV. DISCUSSION

##### 7 A. Amending the Complaint to Add the Vendor as a Defendant 8 and to Add a Breach of Contract Claim

9 Ruiz seeks leave to file the FAC adding Gap's vendor as a  
10 defendant, and adding a breach of contract claim based on an  
11 agreement between Gap and the vendor. Mot. at 5-6. Ruiz seeks to  
12 allege that, under the agreement, the vendor was obligated to  
13 institute or implement commercially reasonable efforts to protect  
14 the personal information of Ruiz and the putative class members,  
15 that the vendor failed to do so, and that as third-party  
16 beneficiaries of the contract, Plaintiff and the putative class  
17 members can sue for breach of the agreement. Id. at 6-7.

18 Gap contends that the motion for leave to amend should be  
19 denied because Ruiz has engaged in undue delay. See Opp'n at 2-4.  
20 Ruiz responds that the Motion is timely because it is based on a  
21 review of testimony and 13,000 pages of documents obtained from  
22 Gap and the vendor in September 2008. See Reply at 2-3. Gap  
23 contends that this delay has prejudiced Gap because Plaintiff  
24 might seek to reopen discovery after the amendments. See Opp'n at  
25 3.

26 Gap fails to meet its burden of showing why the Court should  
27 deny Ruiz leave to add the vendor as a defendant, and to add a  
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1 breach of contract claim against the vendor. The facts of this  
2 case do not indicate the kind of egregious, unexplained delay in  
3 filing a motion to amend that might warrant denying the Motion.  
4 See AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946,  
5 953 (9th Cir. 2006) (noting that eight month delay between time of  
6 obtaining relevant fact and seeking leave to amend was  
7 unreasonable).

8 Gap has not shown that it would be substantially prejudiced  
9 by the proposed amendments. Gap's prejudice contention hinges on  
10 the concern that Ruiz might seek to reopen discovery. However,  
11 the vendor has already been subject to third-party discovery.  
12 Mot. at 8. Employees of the vendor were deposed on September 18-  
13 19, 2008. Punzalan Decl. at 1.<sup>1</sup> The vendor has produced over  
14 15,000 pages of documents. Rivas Decl. Ex. A ("Discovery  
15 Timeline").<sup>2</sup> Ruiz goes so far as to declare that he does not  
16 intend to reopen discovery "absent extenuating circumstances."  
17 Reply at 4.

18 In the cases Gap cites to support its contentions of undue  
19 delay and prejudice, the delay was longer or the prejudice to the  
20 defendant was more substantial than any prejudice Gap will face.  
21 In Kaplan v. Rose, the complaint had already been amended twice,  
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23 <sup>1</sup> Mark Punzalan, an associate at Finkelstein Thompson LLP,  
24 attorneys for Plaintiff, filed a declaration in support of the  
Motion ("Punzalan Decl."). Docket No. 78.

25 <sup>2</sup> Rosemary M. Rivas, a partner at Finkelstein Thompson LLP,  
26 attorneys for Plaintiff, filed a declaration in support of the  
27 Reply ("Rivas Decl."). Docket No. 87. Attached to the declaration  
is an exhibit showing the timeline of discovery events in the  
action.

1 the amendments were not before the court until after summary  
2 judgment motions had been filed, and documents containing two of  
3 the statements plaintiff sought to add were known to him "from the  
4 beginning of the litigation, as evidenced by his complaint." 49  
5 F.3d 1363, 1369-70 (9th Cir. 1995). In Solomon v. North American  
6 Life and Casualty Insurance Co., the plaintiff sought to file a  
7 second amended complaint two weeks before the discovery deadline,  
8 and the amendment failed to state a valid claim for relief. 151  
9 F.3d 1132, 1134-39 (9th Cir. 1998). In McGlinchy v. Shell  
10 Chemical Co., the complaint had been amended twice before, and  
11 there was no notice of an intention to amend until six months  
12 after appellants became aware of the new claims. 845 F.2d 802,  
13 809-10 (9th Cir. 1988).

14 Here, Ruiz seeks to amend the Complaint for the first time,  
15 and correspondence between the attorneys indicates that Gap was on  
16 notice of Ruiz's intention to amend the Complaint at least since  
17 October 24, 2008. See Punzalan Decl., Ex. A ("October 24, 2008  
18 Letter"). Furthermore, the agreement between Gap and the vendor -  
19 upon which the proposed breach of contract claim is based - was  
20 not produced until July 10, 2008, certainly long after the  
21 beginning of the litigation. See Opp'n at 2-3. In any case, the  
22 need to reopen discovery is not fatal to a motion to amend where  
23 facts underlying the new claim come to light during discovery and  
24 the party seeking amendment plausibly accounts for the delay.  
25 Genentech, Inc. v. Abbot Labs., 127 F.R.D. 529, 531 (N.D. Cal.  
26 1989).

27 Ruiz is GRANTED leave to amend the Complaint to add the  
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1 vendor as a defendant and to add a breach of contract claim  
2 against the vendor.

3 **B. Amending the Complaint to Add a Section 17200 Claim**

4 Ruiz also seeks leave to amend the Complaint to re-assert a  
5 section 17200 claim. Mot. at 3. However, on March 26, 2008, the  
6 Court dismissed Plaintiff's claim under the California Unfair  
7 Competition Law, Business and Professions Code section 17200 et  
8 seq. See March 24, 2008 Order at 9. The dismissal was with  
9 prejudice. See id. at 1. Ruiz should have sought leave of the  
10 Court to file a motion for reconsideration of the dismissal. See  
11 Civ. L. R. 7-9(a). Ruiz's motion for leave to amend the Complaint  
12 to add a claim that was previously dismissed with prejudice is  
13 procedurally improper.

14 Ruiz relies on Hinton v. Pacific Enterprises, 5 F.3d 391 (9th  
15 Cir. 1993), to argue that notwithstanding an order of dismissal  
16 with prejudice, a motion to amend should be governed by the  
17 standards of Federal Rule of Civil Procedure 15, and not by the  
18 more stringent standards that apply to a motion for  
19 reconsideration under the local rules. Reply at 6. In Hinton,  
20 however, the plaintiff did file a motion for reconsideration, but  
21 since at least part of her request and the federal rule cited  
22 within the caption related to amending the complaint, the Ninth  
23 Circuit treated the plaintiff's reconsideration motion as a  
24 request to amend. 5 F.3d at 395.

25 Here, even if the Court treats Ruiz's motion as a request to  
26 amend, the amendment would be futile because Plaintiff's proposed  
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1 FAC still fails to state a claim.<sup>3</sup> To pursue a section 17200  
2 claim, a plaintiff must have suffered an injury in fact and lost  
3 money or property as a result of the unfair competition. See  
4 March 24, 2008 Order at 9. Ruiz seeks to re-assert the claim by  
5 alleging that "Plaintiff and Class Members have incurred costs and  
6 spent time associated with monitoring and repairing their credit."  
7 FAC ¶ 82. Plaintiff also alleges that "Plaintiffs have lost  
8 property in the form of their [Personally Identifying  
9 Information]." Id. ¶¶ 83-84.

10 Ruiz relies on Witriol v. LexisNexis Group, where the court  
11 determined that an allegation that plaintiffs had incurred "costs  
12 associated with monitoring and repairing credit impaired by the  
13 unauthorized release of private information" was sufficient to  
14 state a claim under section 17200. No. 05-2392, 2006 WL 2725713,  
15 at \*6 (N.D. Cal. Feb. 10, 2006). Here, the allegations in Ruiz's  
16 proposed FAC are quite different. As well as alleging that Ruiz  
17 and putative class members incurred costs and spent time  
18 associated with monitoring and repairing their credit, Ruiz also  
19 alleges that Gap sent Plaintiff and the putative class members a  
20 notice letter offering twelve months of credit reporting and fraud  
21 assistance without charge. FAC ¶ 61. While Ruiz alleges problems  
22 with the monitoring plans offered by Gap, none of the problems  
23 allege a loss of money. Id. ¶ 62. Ruiz alleges that some parents  
24 of minors had to pay \$250 to sign up for the Family Secure plan,

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26 <sup>3</sup> In the March 24, 2008 Order, the Court treated Gap's motion  
27 as both a motion for judgment on the pleadings and a motion to  
28 dismiss for failure to state a claim. See March 24, 2008 Order at  
1 n.1.

1 but Ruiz also alleges that those parents could contact Gap to get  
2 reimbursed for that cost. Id. ¶ 63.

3 Even if the FAC did not contain these allegations about the  
4 free service and reimbursements offered by Gap, it is far from  
5 clear that the time and expenditure associated with monitoring  
6 one's credit is the kind of loss of money or property necessary  
7 for standing to assert a claim under section 17200. See Butler v.  
8 Adoption Media, LLC, 486 F. Supp. 2d 1022, 1062 (N.D. Cal.  
9 2007)(determining that plaintiffs' expenditure of time and money  
10 preparing application was not loss of money or property necessary  
11 for standing because "[r]estitution, which is the only monetary  
12 recovery possible under § 17200, involves the payment or return of  
13 money or property that belongs to the plaintiff").

14 Nor has Ruiz alleged a loss of property sufficient to state a  
15 claim for relief. Ruiz alleges that "Plaintiffs have lost  
16 property in the form of their PII." FAC ¶¶ 83-84. However, Ruiz  
17 has not cited any authority to support the contention that the  
18 unauthorized release of personal information constitutes "loss of  
19 property" as that phrase is understood in section 17200. Instead,  
20 Ruiz cites to People v. Kozlowski, but there the court concluded  
21 that a PIN code constitutes property for purposes of the crime of  
22 extortion. 96 Cal. App. 4th 853, 865-69 (2002). Plaintiff cites  
23 to People v. Dolbeer, but in that case, the court held that  
24 confidential lists of telephone subscribers were property for  
25 purposes of the crime of receiving stolen property. 214 Cal. App.  
26 2d 619, 622-23 (1963). Indeed, the court noted that the lists  
27 were not "mere information." Id. "As papers they are physical  
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1 goods and come within the definition of personal property  
2 contained in" the penal code. Id. In People v. Parker, the court  
3 re-affirmed that confidential telephone subscriber lists  
4 constituted property for purposes of the penal code. 217 Cal.  
5 App. 2d 422, 426 (1963).

6 None of these cases supports the contention that the  
7 unauthorized release of personal information constitutes "loss of  
8 property" as that phrase is understood in California unfair  
9 competition law. Ruiz's allegations in the FAC that personally  
10 identifying information is property, and that the theft of Gap's  
11 laptops containing Ruiz's personal information counts as a loss of  
12 property under section 17200 are mere conclusory legal allegations  
13 cast in the form of factual allegations. See W. Mining Council v.  
14 Watt, 643 F.2d 618, 624 (9th Cir. 1981) (noting that such  
15 allegations are insufficient to defeat motion to dismiss). Ruiz's  
16 proposed amendments do not cure the defects in Ruiz's prior  
17 attempt to allege a claim under section 17200. See Shermoen v.  
18 U.S., 982 F.2d 1312, 1319-20 (9th Cir. 1992)(affirming denial of  
19 leave to file amended complaint where it did not cure defect that  
20 resulted in dismissal of first complaint). Even though Ruiz  
21 should have filed a motion for reconsideration, it is clear that  
22 any amendment seeking to re-assert the section 17200 claim is  
23 futile.

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25 **V. CONCLUSION**

26 For the reasons stated about, the Court GRANTS IN PART and  
27 DENIES IN PART Plaintiff's Amended Motion for Leave to File First  
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1 Amended Complaint. Ruiz may file a First Amended Complaint that  
2 adds the vendor as a defendant and that adds a breach of contract  
3 claim against the vendor. Ruiz may not file a First Amended  
4 Complaint that adds a claim for violation of the California  
5 Business and Professions Code, section 17200 et seq.

6 The parties shall appear for a Case Management Conference on  
7 April 3, 2009, at 10:00 a.m. in Courtroom 1, on the 17th floor,  
8 U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102.  
9 No later than seven days prior to the Case Management Conference,  
10 the parties shall file a Joint Case Management Statement.

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12 IT IS SO ORDERED.

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14 Dated: February 3, 2009



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16 UNITED STATES DISTRICT JUDGE  
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